

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

-----X  
FERMIN PENA,

Petitioner,

-against-

H.D. GRAHAM, Superintendent

Respondent.  
-----X

USDC SDNY  
DOCUMENT  
ELECTRONICALLY FILED  
DOC. #:  
DATE FILED: 8-25-08

PRO SE

08 Civ. 3828 (SHS) (THK)

ORDER

THEODORE H. KATZ, United States Magistrate Judge.

This pro se action for a writ of habeas corpus, filed pursuant to 28 U.S.C. § 2254, was referred to this Court by the Honorable Sidney H. Stein, United States District Judge. Presently before the Court is a motion by Petitioner for Application to Appoint Counsel, pursuant to 18 U.S.C. § 3006A(g). For the reasons set forth below, the motion is denied.

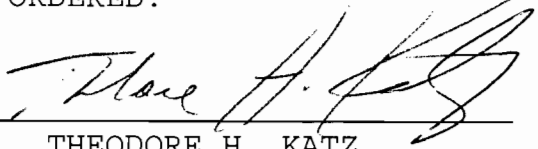
Civil litigants, unlike criminal defendants, do not have a constitutional right to the appointment of counsel. See Gardner v. New York, No. 04 Civ. 4675 (LTS) (DF), 2005 WL 696953, at \*1 (S.D.N.Y. Mar. 24, 2005); Mackey v. DiCaprio, 312 F. Supp. 2d 580, 581 (S.D.N.Y. 2004). Under 28 U.S.C. § 1915(e)(1), however, a court may appoint pro bono counsel to represent petitioners in civil cases. In this Circuit, "[d]istrict courts exercise substantial discretion in deciding whether to appoint counsel . . . ." Ferrelli v. River Manor Health Care Ctr., 323 F.3d 196, 203 (2d Cir. 2003). When deciding whether to appoint counsel, "the

district judge should first determine whether the indigent's position seems likely to be of substance." Id. (citing Hodge v. Police Officers, 802 F.2d 58, 61 (2d Cir. 1986)); see also Burgos v. Hopkins, 14 F.3d 787, 789 (2d Cir. 1994) ("[T]he threshold requirement in considering a request for appointment of counsel [is] the likelihood of success on the merits of the claim.") (citing Hodge, 802 F.2d at 60-1). Where this threshold requirement is met, a court "should then consider the indigent's ability to investigate the crucial facts, whether conflicting evidence implicating the need for cross-examination will be the major proof presented to the fact finder, the indigent's ability to present the case, the complexity of the legal issues, and any special reason in that case why appointment of counsel would be more likely to lead to a just determination." Wenger v. Canastota Cent. Sch. Dist., 146 F.3d 123, 125 (2d Cir. 1998) (citing Hodge, 802 F.2d at 61-2).

Applying these factors to the Petition, the Court concludes that this action does not merit the appointment of counsel. Petitioner has already filed his Petition and appears able to deal with the straightforward factual and legal issues involved. Further, there will be no need for Petitioner to engage in additional fact finding since the Court need only rely on the record and prior counsel's submissions in the New York courts.

Accordingly, Petitioner's application is denied.

SO ORDERED.

  
\_\_\_\_\_  
THEODORE H. KATZ  
UNITED STATES MAGISTRATE JUDGE

Dated: August 25, 2008  
New York, New York

Copies mailed to:

Fermin Pena  
03-A-1587  
Auburn Correctional Facility  
P.O. Box 618  
Auburn, NY 13021

Nancy D. Killian  
Assistant District Attorney  
Bronx County  
198 East 161<sup>st</sup> Street  
Bronx, New York 10451  
(718) 590-2156